Due service of the within Brief is hereby acknowledged this .....day of April, A. D. 1931.

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_____

Attorneys for Appellees.

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CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1931.

No. 43.

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation, and Ambassador Petroleum Company, a corporation,

Appellants,

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as One of the Judges Thereof,

Appellees.

APPELLANTS' AND PETITIONERS' BRIEF ON MERITS.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1930.

No. 852.

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation, and Ambassador Petroleum Company, a corporation,

Appellants,

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as One of the Judges Thereof,

Appellees.

APPELLANTS' AND PETITIONERS' BRIEF ON MERITS.

I.

The Opinion of the Court Below.

The opinion of the District Court of Appeal, Second Appellate District, Division Two, of the state of California, has not yet been officially reported. However, the opinion was rendered under date of November 29, 1930,

is unofficially reported in 63 Cal. App. Dec. 1175, and a copy of the opinion appears in the printed record* [R. 200].

II.

Jurisdiction.

A concise statement of the grounds on which the jurisdiction of this court is invoked, embodying all that is required to be set forth in the statement described in paragraph 1 of Rule XII of this court, will be found in the printed "Statement as to Jurisdiction on Appeal" heretofore filed by appellants, and in "Appellants' Brief in Opposition to Motion to Dismiss or Affirm, Petition for Writ of Certiorari" and the supplement thereto. Reference thereto is hereby made in order to avoid repetition.

III.

Statement of the Case.

A full statement of the case has been given under heading C in our previous "Statement as to Jurisdiction on Appeal" and at pages 6-19 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," and in the interest of brevity reference is hereby made thereto without repetition here. While the references therein were to the *typewritten* transcript (the record not having then been printed), such references are believed adequate because the pages of the typewritten record are shown by folio number in the lefthand margin of each of the pages of the *printed* record, and the index to the printed record also gives the page reference to the original typewritten record.

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*All references herein are to the printed record.

IV.

Specification of Errors.

Appellants and petitioners hereby adopt their assignment of errors [R. 244] as their specification of the assigned errors intended to be urged, reference to which is hereby made without repetition, in the interest of brevity. Appellants adopted their assignment of errors as their statement of points to be relied upon filed under the requirement of paragraph 9 of Rule XIII [R. 267], but, as stated therein, same may be more logically restated under the headings or points set forth therein [R. 268] which are set out herein in more condensed form in the "Summary of the Argument."

V.

ARGUMENT.

Summary of the Argument.

Point A.

PROHIBITION IS APPELLANTS' PROPER REMEDY. THE STATE COURT HAVING TREATED THE FEDERAL QUESTIONS INVOLVED AS BEING PROPERLY RAISED BY PROHIBITION AND HAVING DECIDED THEM ADVERSELY TO THE ASSERTED FEDERAL RIGHT, SUFFICIENTLY ESTABLISHES THE JURISDICTION OF THIS COURT TO PASS UPON THE MERITS OF THE FEDERAL QUESTIONS PRESENTED.

Point B.

THE VALIDITY OF THE STATE STATUTE INVOLVED UNDER THE FEDERAL CONSTITUTION IS TO BE DETERMINED BY ITS OPERATION AND EFFECT AS APPLIED TO APPELLANTS, AND APPEAL RATHER THAN CERTIORARI IS THE PROPER REMEDY.

Point C.

THE FACTS BEING ADMITTED BY DEMURRER AND AN INQUIRY THEREOF BEING ESSENTIAL TO THE ENFORCEMENT OF THE FEDERAL RIGHTS ASSERTED, THIS COURT WILL EXAMINE SAME AND DRAW ITS OWN CONCLUSIONS.

Point D.

LEGISLATION NOT LIMITED TO THE REGULATION OF PRIVATE CORRELATIVE RIGHTS IN A COMMON SOURCE OF SUPPLY OF OIL OR GAS BY PREVENTING WASTE OR OTHER CONDUCT BY ONE OR MORE OF THEM WHICH INJURIOUSLY AFFECTS THE CORRELATIVE RIGHTS OF OTHERS IN THE COMMON SOURCE OF SUPPLY BUT WHICH IS DIRECTED TO THE CURTAILMENT OF PRODUCTION ITSELF OR TO COMMERCIAL CONSERVATION FOR THE BENEFIT OF THE CONSUMING GENERAL PUBLIC, IS REPUGNANT TO THE "DUE PROCESS" CLAUSE OF THE FOURTEENTH AMENDMENT.

Point E.

THE STATUTE AS APPLIED TO APPELLANTS CONSTITUTES A TAKING OF APPELLANTS' PROPERTY FOR A PUBLIC USE WITHOUT COMPENSATION AND WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Point F.

UNDER THE ADMITTED FACTS, THE EXTENT OF THE INVASION OF APPELLANTS' PROPERTY RIGHTS IS SO GREAT, SO ARBITRARY, SO OPPRESSIVE, AND SO UNREASONABLE, THAT IT GOES TOO FAR UNDER THE POLICE POWER OF THE STATE.

Point G.

THE STATUTE INVOLVED IS VOID FOR UNCERTAINTY AND LACK OF A SUFFICIENTLY DEFINITE STANDARD OF CONDUCT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

POINT H.

THE "PRIMA FACIE EVIDENCE" CLAUSE OF THE STATUTE VIOLATES THE "DUE PROCESS" CLAUSE OF THE FOURTEENTH AMENDMENT.

POINT I.

THE STATUTE INVOLVED, AS APPLIED TO APPELLANTS, UNCONSTITUTIONALLY IMPAIRS APPELLANTS' LEASE CONTRACTS.

POINT J.

THE STATUTE INVOLVED, AS APPLIED TO APPELLANTS, DENIES TO APPELLANTS THE EQUAL PROTECTION OF THE LAWS.

POINT K.

IF APPEAL WAS IMPROVIDENTLY SOUGHT AND ALLOWED, THEN CERTIORARI SHOULD BE GRANTED UPON THE PAPERS WHEREON THE APPEAL WAS ALLOWED.

Appellants' Brief in Opposition to Motion to Dismiss or Affirm Is Adopted as Appellants' Brief on the Merits, With the Additions Herein Made.

Since the main, if not the sole, ground of the motion to dismiss or affirm, is the claim that no substantial federal question is presented, and this involved a discussion of the merits of the federal questions presented, it follows that each of the above points has already been presented and argued by appellants at some length in "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," and also in appellants' "Statement as to Jurisdiction on Appeal," reference to both of which is hereby made. For the sake of brevity, what has there been said will not be repeated here. We desire, however, to add slightly to the argument and citation of authorities therein contained, and to reply to the attempted answer thereto contained in the "Statement of Appellees as to Jurisdiction on Appeal."

POINT A.

Prohibition Is Appellants' Proper Remedy. The State Court, Having Treated the Federal Questions Involved as Being Properly Raised by Prohibition, and Having Decided Them Adversely to the Asserted Federal Right, Sufficiently Establishes the Jurisdiction of This Court to Pass Upon the Merits of the Federal Questions Presented.

In addition to the argument contained at pages 21, *et seq.* of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," under an identical heading, attention is called to the admission contained in the "Statement of Appellees as to Jurisdiction on Appeal," page 6, to the effect that the petition for writ of prohibition in the state court raised two federal questions which the District Court of Appeal assumed were properly before it, the first going "to the power of the state to prohibit the waste of natural gas, and the second to the degree of certainty required in the state statute to meet the requirements of due process of law." While we do not agree that this statement by appellees is an accurate or complete statement of the federal questions involved, the admission of appellees that the record in the state court properly presented such federal questions and that the lower court assumed that such federal questions were involved, and decided them adversely to the claimed repugnancy to the Federal Constitution, makes it the clear duty of this court to pass upon the merits of the federal questions presented.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 257;
Rogers v. Hennepin County, 240 U. S. 184, 188;
Hill v. Smith, 260 U. S. 592, 594;
Home Ins. Co. v. Dick, 281 U. S. 397, 407.

At page 260 of the record appears a stipulation that each of the federal questions set forth in our assignment of errors "were duly, regularly, properly and timely raised in the prohibition proceedings."

Under the rule of these cases appellees' arguments to the effect that appellants had an adequate remedy by appeal with the possible aid of a supersedeas, and that prohibition was not the proper remedy, and to the effect that the federal questions presented did not affect the jurisdiction of the lower court to enforce the statute or to make or enforce its order attempting to apply the state statute against appellants, have no place here. The state court, which alone determines local questions of procedure, did not deny relief because a writ of prohibition was sought or because it considered that there was a plain, speedy and adequate remedy by appeal and a supersedeas, or because it did not consider that the federal questions presented did not go to the jurisdiction of the Superior Court to enforce the statute or to make or enforce its order attempting to apply the state statute against appellants. The highest state court in which a decision in the suit could be had, said nothing whatever as to the form of the remedy or as to the right of appellants to proceed by writ of prohibition or as to the effect of the Superior Court being a court of general jurisdiction, but considered that the federal questions presented did go to the jurisdiction of the Superior Court to enforce the statute or to make or enforce its order attempting to apply the state statute against appellants, and decided the case solely on the merits of the federal questions presented, and the state statute involved and the order attempting to enforce the

state statute against appellants were sustained as not repugnant to the Federal Constitution in the particulars claimed by appellants. This establishes the jurisdiction of this court, for as stated by this court in *Rogers v. Hennepin County, supra:*

> "It is well settled that where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment, assuming it to be a final judgment, as it is here." (Citing many prior decisions of this court)—240 U. S. 184, 188-189.

It is thoroughly established by the many cases cited in support of the above statement, that it is enough that the state court holds that the federal questions are before it according to the state practice and proceeds to determine them. Furthermore, even if this did not conclusively settle the jurisdiction of this court to review the state decision on the federal questions presented, the rule is well established that prohibition is a proper method of testing the constitutionality of a state statute. (See cases cited at pages 23-27 of our former brief, and *Smith v. Cahoon*, 283 U. S....., decided May 25, 1931, 75 L. Ed. 812.)

Appellees, seeking to invoke the rule of this court that when the decision of the state court rests upon an independent or non-federal ground adequate to support it, this court has no jurisdiction,—refer (page 18 of "Statement of Appellees as to Jurisdiction on Appeal") to what appellees call the third point raised and decided by the lower

court: "that of the evidence to sustain the findings essential to jurisdiction under state practice," and cites the following extract from the opinion of the District Court of Appeal as deciding this point:

> "Another answer to this argument of petitioners is that having determined that the court has the jurisdiction to determine what is an unreasonable waste, we cannot interfere by the writ of prohibition to deprive its judgment of effect. And we here direct attention to the determination of the respondent court that 'there appears to be an unreasonable waste of natural gas in the Santa Fe Oil Field,' and 'that the evidence available . . . shows that the unreasonable waste of natural gas in said field may be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground, etc., etc.' It does not appear from the facts presented to us that in so far as the particular case before us is concerned the court exceeded its jurisdiction in finding as we have already quoted." [Opinion, R. 362-363.]

It is obvious, however, from a mere reading of the first sentence of the above quotation that the statement of the lower court that the Superior Court "has the jurisdiction to determine what is an unreasonable waste" is based upon its prior determination in the opinion (a) that the state statute is not void for uncertainty under the due process clause of the Fourteenth Amendment, and (b) that the statute as enforced against appellants does not constitute a taking of appellants' property without due process of

law, and ... upon its determination of the other federal questions involved. All of these federal questions are thus inseparably interwoven with, and are basis for, the lower court's statement that the Superior Court had jurisdiction to determine that it is an "unreasonable waste of natural gas." As this court said in *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U. S. 157, 164:

> "... where the non-Federal ground is so interwoven with the other [federal ground] as not to be dependent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other [federal question], our jurisdiction is plain."

See also cases cited at page 23 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm."

Furthermore, the alleged finding referred to by the District Court of Appeal as being a determination by the Superior Court that appellants are unreasonably wasting natural gas, even a casual examination discloses, is not a finding that appellants are unreasonably wasting natural gas or a finding that any of the oil wells of appellants is unreasonably wasting natural gas. It is merely a finding of unreasonable waste of gas *in the field*. This is demonstrated by what we have already said at pages 52-54 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm" where it is also shown that even if there had been a finding by the Superior Court that appellants are unreasonably wasting natural gas there would be *no factual basis* therefor under the admitted facts which were established by undisputed evidence in the Superior Court [R. 3-8].

Where the undisputed facts upon the basis of which a federal right is asserted are set out in the pleadings and are admitted by demurrer, this court is not bound by the conclusions of the highest court in the state as to their effect but will analyze the admitted facts and draw its own conclusions as to their effect (Frank v. Corrigan, 257 U. S. 312 and cases therein cited), particularly where such inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution. (Beidler v. So. Carolina Tax Commission, Advance Opinions, Case No. 2, Oct. Term 1930, 75 L. ed. 69, 70, and cases there cited; Postal Tel. Cable Co. v. Newport, 247 U. S. 464.)

Furthermore, the provisions of the preliminary injunction referred to in the above quoted extract from the opinion of the District Court of Appeal were made without any consideration of or attempt to regulate the private correlative rights of the surface owners by preventing waste or other conduct by one or more of them injuriously affecting the operations of other surface owners, but in disregard and in violation thereof, were admittedly inserted solely for the purpose of conserving the natural gas, of which appellants were thereby deprived, for the future use and benefit of the general public as consumers of gas for light, heat and power [R. 14], and this is also shown by the very face of the order itself, by the recitals therein that the gas production allowed by its terms is limited to the present market demands or outlets above ground for gas from the field for light, heat and fuel [R. 180-181] notwithstanding that it deprived appellants of sufficient gas to produce the oil it was admittedly then producing under efficient methods which

did not injuriously affect the operations of others in the field [R. 7]. See more extended discussion at pages 46-54 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm." Whether this can be done without violation of the Fourteenth Amendment is one of the federal questions presented. Hence, the so-called third point in the opinion of the District Court of Appeal necessarily involves a federal question, which appellants are entitled to have this court consider on its merits.

The claim at page 18 of "Statement of Appellees as to Jurisdiction on Appeal" that the uncontradicted and admitted facts set forth at pages 9-18 of appellants' Statement are largely the controverted facts constituting the material issues raised by the pleadings in the Superior Court, is without foundation. Paragraphs 7 and 8 [R. 3-8] of the Petition for Writ of Prohibition contain allegations of certain facts which it is alleged appeared *"from the uncontradicted evidence introduced upon the hearing"* of the preliminary injunction in the Superior Court. The demurrer [R. 199] admits all of the material facts alleged in the petition for the writ of prohibition, including the allegations that the facts alleged in paragraphs 7 and 8 appeared from the uncontradicted evidence in the Superior Court.

Favorite v. Superior Court of Riverside Co., 181 Cal. 261, 264;

Hevren v. Reed, 126 Cal. 219, 221;

Kirby v. Superior Court, 68 Cal. 604, 606.

The claim of appellees (p. 19 of Appellees' Statement) that appellants could not in a prohibition proceeding in

which the appellee Superior Court is the adverse party raise any issues of fact, and also the claim that prohibition is not the proper remedy where facts not judicially noticeable must be alleged and found in order to establish that the court was acting without or in excess of its jurisdiction, not only have no place here under the decisions already cited, but will not bear analysis. While under the state practice the writ of prohibition was necessarily addressed to the appellee Superior Court, the statutes of California (Secs. 1102-1105, 1089, 1091, Cal. Code of Civil Procedure) expressly contemplate that on the return day of the alternative writ of prohibition either an *answer* to the verified petition or a *demurrer* thereto, or *both, may be filed and for a trial of all issues* of fact raised by the answer where an answer is filed. Rule XXVI, section 3, of the rules of the Supreme Court and District Courts of Appeal of California provides:

> "Sec. 3. Upon the return day of the alternative writ the respondent may make return, either by demurrer or by answer, or by both. If the return be by demurrer alone, and the demurrer is not sustained, the writ may be ordered to issue without leave to answer over." (204 Cal. LVII.)

While the appellee Superior Court is the nominal adverse party the local practice is to have attorneys for the adverse party litigant in the suit below appear as attorneys on behalf of the Superior Court (*Havemeyer v. Superior Court*, 84 Cal. 327, 373), and this was done in the instant case. As stated by the court in the case last cited, the attorneys for the plaintiffs in the Superior Court have, as the attorneys for the appellee Superior

Court, presented every issue of fact and of law "which could have been made in behalf of the state if it had been a formal party to the proceedings, which, as we have seen, the rule does not require." (84 Cal. 373.)

From the foregoing statutes, rules of court and local decisions and the many decisions cited at page 23 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," it is clear that said claims of appellees are without foundation.

Of course, where the constitutionality of a statute is called in question by application for writ of prohibition, upon the ground that it is void upon its face, as for instance for uncertainty, the court need not look further than to the statute itself and to matters of which it can taken judicial knowledge. However, where a court is proceeding in violation of the express or implied mandate of a constitution or grants to or takes from a party rights which a constitution or statute expressly or impliedly provides shall not be granted or taken away, or the operation or effect of the statute as applied violates a right under the Federal Constitution, the facts must be alleged in the petition for prohibition, for only in this way can it be established that the court is violating the Federal Constitution or exceeding its jurisdiction (see California cases cited at pages 23-29 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm). These cases establish that such action by a court constitutes not just a mere error in the exercise of jurisdiction but an act in excess of its jurisdiction. For instance, in *Jacobsen v. Superior Court,* 192 Cal. 319, the court stated that since the respondent Superior Court filed only

a demurrer to the petition for writ of prohibition, it thereby admitted the facts set forth in the petition to be true, and held that although the facts so alleged and admitted showed that the Superior Court, a court of general jurisdiction, had jurisdiction of the parties, and to grant injunctions, yet under the admitted facts so alleged it had no jurisdiction to *make* or to *enforce* the *preliminary injunction* involved in that *prohibition* proceeding, in that the effect thereof was to take petitioners' property for a public use without just compensation. It was also claimed in that case that "the trial court, a court of equity, having had jurisdiction to make said order, it had jurisdiction to err in making it and hence that prohibition will not lie" (p. 330), but the court held that

> "* * * no court in any other action or proceeding than an action in eminent domain has jurisdiction to order the taking or damage of private property for a public use. * * * Such an attempt on the part of the superior court amounts to more than mere error. As was well said by this court in the case of McClatchy v. Superior Court, 119 Cal. 413 [39 L. R. A. 691, 51 Pac. 696], in which another fundamental right of the citizen was attempted to be denied him and in which it was urged that the action of the court in so doing was merely error and hence not reviewable upon *certiorari:* 'It was error certainly but was more than that; it was a transgression of a fundamental right guaranteed to every citizen charged with an offense or whose property is sought to be taken, of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in

> method of procedure, which has the effect to deprive one of a constitutional right is as much an excess of jurisdiction as where there exists an inceptive lack of power. "The substance and not the shadow determines the validity of the exercise of the power." (Citing Postal Tel. etc. Co. v. Adams, 155 U. S. 689, 698 [39 L. Ed. 311, 15 Sup. Ct. Rep. 268, 360, see, also, Rose's U. S. Notes].) The facts in this case being admitted and the respondent herein having conceded that if its entry and operations upon the lands of the petitioner amounts to a taking and damaging thereof within the meaning of section 14 of article I of the constitution the order of the court assailed herein would be violative of that constitutional provision, it would seem that the writ of prohibition is a proper and appropriate remedy where, as in this case, the petitioners have no plain, speedy, or adequate remedy in the ordinary course of law." (192 Cal. 319, 331-332.)

The opinion in that case alone answers all of the argument advanced by appellees on this phase of this case. It and *Baar v. Smith,* 201 Cal. 87, 100-102, and *Long v. Superior Court,* 102 Cal. 449, 453, 455, conclusively answer the claims of appellees (page 22 of Appellees' Statement) that a writ of prohibition will not issue against "a court of equity in a cause arising in equity where it had jurisdiction of the subject matter and of the parties * * * because * * * the Chancellor enjoined too much." However, the instant case is not a cause arising in equity, but is rather one in which the authority of the court and the cause of action, if any, is statutory, and arises under the state statute involved.

The suggestion is made by appellees (p. 25, Appellees' Statement) that if this court should reverse the California court and order a writ of prohibition to issue to the appellee court it would thereby prevent a trial on the merits. However, if the state statute involved is held void for uncertainty and lack of a sufficiently definite standard of conduct under the due process clause of the Fourteenth Amendment of the Federal Constitution (Point G), or because it violates any of the other constitutional guarantees (Points H, I and J) this court should reverse the decision of the state court and order the writ of prohibition to be issued as prayed for. If this court, however, merely holds that the operation and effect of the statute as applied to appellants in the preliminary injunction constitutes a taking of appellants' property for a public use without compensation and without due process of law, in violation of the Fourteenth Amendment, or that the extent of the invasion of appellants' property rights is so great, arbitrary, oppressive and unreasonable that it goes too far under the police power of the state, then the Superior Court should be prohibited only from enforcing the preliminary injunction against appellants, or taking any further steps or proceedings inconsistent with the opinion of this court. In short, there is nothing strange or anomalous about this case, as suggested by appellees, which will prevent this court from framing an appropriate order.

POINT B.

The Validity of the State Statute Involved Under the Federal Constitution Is to Be Determined by Its Operation and Effect as Applied to Appellants, and Appeal Rather Than Certiorari Is the Proper Remedy.

We have nothing to add to what is said under this point at page 28 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," except the following cases on the proposition that in passing upon constitutional questions this court has regard to substance and not to mere matters of form, and, in accordance with familiar principles, the constitutionality of a statute must be tested by its operation and effect as applied to appellants as shown by the record, as well as by the question whether or not on its face it is repugnant to the Federal Constitution.

Henderson v. Mayor of New York, 92 U. S. 259, 268;

Bailey v. Alabama, 219 U. S. 244;

United States v. Reynolds, 235 U. S. 133, 148-149;

Mountain Timber Co. v. Washington, 243 U. S. 219, 237.

POINT C.

The Facts Being Admitted by Demurrer and an Inquiry Thereof Being Essential to the Enforcement of the Federal Rights Asserted, This Court Will Examine Same and Draw Its Own Conclusions.

Nothing further need be added to the argument and citations contained at pages 29-30 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm."

POINT D.

Legislation Not Limited to the Regulation of Private Correlative Rights in a Common Source of Supply of Oil or Gas by Preventing Waste or Other Conduct by One or More of Them Which Injuriously Affects the Correlative Rights of Others in the Common Source of Supply but Which Is Directed to the Curtailment of Production Itself or to Commercial Conservation for the Benefit of the Consuming General Public, Is Repugnant to the "Due Process" Clause of the Fourteenth Amendment.

This proposition is fully discussed and shown to be supported by the previous decisions of this court at pages 30-46 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," reference to which is hereby made without repetition in the interest of brevity. We wish to add a little additional argument and citations and to answer the claims made by appellees (pp. 6-8, Appellees' Statement), wherein it is urged that "the power of the state to prohibit the waste of natural gas has been explicitly decided by this court." This statement of appellees begs the question. This statement is not inconsistent with the fact that the power of the state to prohibit the waste of natural gas is limited to the prevention of waste or other conduct by one or more operators which injuriously affects the correlative rights of other operators in a common source of supply. When, as here, legislation on the subject in its operation and effect as applied to appellants is directed to the curtailment of production itself not injuriously affecting the rights or operations of others, or is directed to enforced commercial conserva-

tion of privately owned natural gas for the benefit of the consuming general public, or is directed to declaring that to be a waste which is not in fact waste but which is beneficially used for its primary and most valuable function of producing oil under conditions not injuriously affecting the rights of other operators in the field, it is repugnant to the due process clause of the Fourteenth Amendment of the Federal Constitution. (See cases cited at pages 30-60 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm.")

It makes no difference whether the owner or lessee of land containing gas and oil beneath the surface is the owner of the oil and gas beneath his land in place or whether his ownership is qualified by the correlative rights of other surface owners, and does not become absolute until the surface owner or lessee reduces the same to possession, or whether each surface owner has a mere right, in common with other surface owners, to reduce it to possession by operations on his own land. The practical result is the same, for in any event all of the surface owners in the field collectively own the underlying oil and gas deposits and *the public* has no interest whatever therein. This court, in *Ohio Oil Company v. Indiana,* 177 U. S. 190, after pointing out that things *ferae naturae* are public property, private ownership of which every person in the state is endowed with a power of acquiring by reducing same to possession, said:

> "* * * *In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field.* This difference points at

> once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No devesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. *Geer v. Connecticut,* 161 U. S. 519, 525, 40 L. ed. 793, 795, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. *They could not be absolutely deprived of this right which belongs to them without a taking of private property."*

The right of the surface owners in the field to reduce oil and gas to possession is therefore a valuable property right which is protected by the Fourteenth Amendment, even in states like Indiana where the minority rule of property exists that there is no ownership or title in the surface owner in the underlying gas and oil until the same have been reduced to possession. At pages 47-48 of our former brief we have shown, by an unbroken line of cases, that the majority rule prevails in California, that oil and gas in place are minerals and are part of the land and belong to the owner of the land as long as they are on it or in it or subject to his control; that the underlying oil and gas can be sold or reserved in place by the surface owner, and instruments of sale thereof in place are required to be executed with the formalities of a conveyance of real estate and create a corporeal rather than an incor-

poreal interest, and may operate to sever the mineral estate from the surface estate (see pages 48-47 of our former brief). The quotation from *Acme Oil Co. v. William*s, 140 Cal. 681, by the Supreme Court in *People v. Associated Oil Co.* (pages 28-29, Supplement to Brief of Appellees on Motion to Dismiss or Affirm), to the effect that the ownership of oil and gas in the property of anybody [illegible] is not inconsistent with the view because the statute contemplates that the right to take the oil or gas must be obtained from the surface owner. It is well established that a person taking oil and gas without permission of the surface owner of the land in which it is found is liable in damages to such owner thereof. In addition to the cases cited in our former brief, see the following recent California cases:

> *Black v. Solano Co.* (decided by District Court of Appeal May 18, 1931), 65 Cal. App. Dec. 669, 672-673;
>
> *Stone v. City of Los Angeles,* 65 Cal. App. Dec. 688;
>
> *Kidwell v. General Petroleum Co.* (Supreme Court of Cal., June 1, 1931), 300 Pac. 1.

In *West v. Kansas Natural Gas Co.,* 221 U. S. 229, 254-255, this court, in referring to the *Ohio Oil Company case,* said:

> "The case, therefore, is an authority against, not in support of, the contention of the appellant in the case at bar [viz., the right of the state to conserve natural resources "for the use of the inhabitants of the state, present and future"].

"The statute of Indiana was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it—a reduction to possession of property—not to take away any right of use or disposition after it had been reduced to possession. It was sustained because such was its purpose, and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it when in possession.

"The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. It does not alone regulate the right of the reduction to possession of the gas, but, when the right is exercised, when the gas becomes property, takes from it the attributes of property,—the right to dispose of it; indeed, selects its market, to reserve it for future purchasers and use within the state, on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce."

See, also, *Haskell v. Natural Gas Co.*, 172 Fed. 563, holding that gas which has been reduced to possession by a surface owner is the personal property of such surface owner and is not a product which a state may conserve and preserve by law as a thing in which the people of the state have a common interest, but is an absolute property right of which the owner cannot be deprived without just compensation.

Since, under the admitted facts of this case, each of the wells of petitioners is being operated at its optimum gas-oil ratio, which is amongst the lowest in the field, and such wells are so efficiently operated that they do not injuriously affect the operations of other operators in the field [R. 4, 7], the only theory under which any claim is made by opposing counsel that appellants are unreasonably wasting natural gas is that the amount of gas which appellants permit to escape into the air, as compared to the amount of gas produced by appellants, is too large. It is an open question whether the amount of gas escaping to the air is a factor in determining what constitutes an unreasonable waste of gas. (See pp.61-71 of our former brief.) However, the gas so permitted to escape is gas which has been reduced to possession by appellants in their pipelines and thereafter in their casinghead gasoline refinery, so that it was and is the absolute personal property of appellants. Furthermore, it admittedly was produced efficiently and so as not to injuriously affect the rights of other operators and, before being permitted to escape, is utilized three times: first, in the efficient production of oil by utilizing the lifting force of gas in the production of oil; second, in the manufacture of casinghead gasoline; and third, for

field uses, for light and fuel and the marketing of such of same as can be sold. What is left after this manifold utilization in the production of wealth of great value cannot be sold or even given away and so is necessarily permitted to escape into the air as a valueless by-product. Yet the effect of the statute as construed and applied to [R. 7.] Yet the effect of the statute as construed and applied to appellants is to deprive appellants of the use of such gas for such purposes, solely for the purpose of reserving the same in the ground for the future use and benefit of, until the same can be used by, the general public as consumers, but without any compensation to appellants for the tremendous loss resulting therefrom. [R. 8, 14.]

That the basis of the legislative power of regulation of the production of oil and gas is the protection of the private correlative rights of the surface owners by preventing waste or other conduct by one or more of them injuriously affecting the rights of others of them, and does not extend to depriving the surface owners of oil or gas and conserving the same for the use and benefit of the general public, is shown not only by the foregoing extract from *West v. Kansas Natural Gas Co.,* but is conclusively demonstrated by the following extract from the opinion of this court in the *Ohio Oil Company* case:

> "But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual

possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. *Hence it is that the legislative power,* from the peculiar nature of the right and the objects upon which it is to be exerted, *can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste.* * * * Viewed, then, as a statute *to protect or to prevent the waste of the common property of the surface owners,* the law of the state of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute *protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.* * * * If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the *legislative power to protect the right of property from destruction."* (177 U. S. 190, 210-211.) (Italics ours.)

(Note: We have heretofore pointed out, at page 49 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," that the deprivation need not be absolute. Any unauthorized restriction of the use thereof is as much a taking for constitutional purposes as if the property itself were taken.)

In view of the above quoted extract from the opinion of this court in the *Ohio Oil Company* case, and the review of this case and of the succeeding decisions of this court which are analyzed at pages 31-40 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," there can be no doubt but that, under the previous decisions of this court, the basis and extent of the legislative power is the protection of the private correlative rights of the surface owners in a common source of supply by preventing waste or other conduct by one or more of them which injuriously affects the private correlative rights of others in the same field, and that no right exists in the *public* to the oil and gas in such field, nor can the surface owners constitutionally be deprived thereof, without compensation, *in the interest of the public as consumers.*

The Supreme Court of California, in *People v. Associated Oil Company,* decided shortly after the decision of the District Court of Appeal in the case at bar, erroneously states that "because of their peculiar nature, the public has a definite interest in their preservation from waste and destruction" and that "This is true because of their character as natural resources and also because the public interest has attached by virtue of positive statutory law or by court judgment independent of statute"; it bases these statements upon the decision of this court in *Ohio Oil Company v. Indiana,* 177 U. S. 190, which it states does not limit the legislative power to the protection or the prevention of waste of the common property of the surface owners by the acts of one or more of them injuriously affecting the correlative rights

of others, and cites extracts from *Hague v. Wheeler,* 157 Pa. St. 324, and *Townsend v. State,* 147 Ind. 624, to support its conclusion. (See pages 29-32 of Appendix B of "Supplement to Brief of Appellees on Motion to Dismiss," where the opinion is set out in full.)

An analysis of the decision of this court in the *Ohio Oil Company* case, however, shows that this court did not follow or approve the statements in *Hague v. Wheeler* and *Townsend v. State* to the effect that the power of the state extended not only to protecting all the correlative surface owners in the exercise of their correlative rights by preventing waste or other conduct by one or more of them injuriously affecting others but also extended to regulation and control in the interest of the public at large as consumers. An examination of the opinion in *Ohio Oil Company v. Indiana* shows that the quotation made by the court from the opinions of both of these two cases was a part of its discussion *for the purpose of showing 'the nature of the right of the surface owner' to the gas and oil as they are contained in their natural reservoir, and the rule of property on that subject in the state of Indiana.* The court did not refer to these cases or the quoted extracts therefrom for *the purpose of showing the power of the legislature to enact legislation upon that subject.* On the subject of the legislative power this court plainly held that the legislative power could be manifested only for the purpose of protecting the correlative private rights of the surface owners by preventing waste or other conduct by one or more of the surface owners injuriously affecting other surface owners, as is clearly shown by the foregoing extract from the opinion.

That the police power of the state is so limited is also clearly shown by the opinions of this court in *West v. Kansas Natural Gas Co.*, 221 U. S. 229, and *Walls v. Midland Carbon Co.*, 254 U. S. 300, where the prior decisions of this court, including the *Ohio Oil Company* case, are reviewed and analyzed. (See pages 34-40 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," reference to which is hereby made.)

Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504, involved the constitutionality of a statute of New York which contained four prohibitions respectively forbidding

> "*accelerating or increasing the flow of percolating waters or natural carbonic acid gas,* such as are found at Saratoga Springs, from wells bored into the rock, by *pumping or any artificial contrivances whatsoever, first, absolutely and without qualifications;* second, when the result of so doing will be to impair the natural flow or the quality of such waters or gas in the spring or well of another person; third, when the object of so doing is to extract and collect the carbonic acid gas for the purpose of marketing the same; and fourth, *prohibit the doing of any act whereby the flow* or quality of the waters described, or of the carbonic acid gas or other mineral ingredients therein, in any spring or well, *is diminished,* etc."

The fourth prohibition was so broad and unqualified that it was admitted to be unconstitutional and inoperative. The first and second prohibitions were likewise declared to be unconstitutional. Referring to them, the court said:

> "The former [the first two prohibitions of the statute] not only prohibit pumping waters and gas

described where the result will be to interfere with the spring of another person, but forbid such acts absolutely, even though they interfere with nobody. Their application is not limited to waste or commercial uses, but, under them, as they are plainly and explicitly written, a landowner in any part of the state is prohibited from extracting, by means of the simplest and most modest contrivance, waters from a well bored on his premises for the most legitimate and natural purpose connected with the use of his premises, provided the well happens to strike rock, and provided the water contains mineral salts and carbonic acid gas; and *this whether such act interferes or not, in an infinitesimal degree, with the supply of some other person. It seems to me that this is such a clearly unlawful interference with well-established property rights already discussed that amplification of the idea is unnecessary.*" (23 L. R. A. (N. S. 445-446.) (Italics ours.)

With reference to the third provision, *in order to uphold its constitutionality,* as stated by this court in *Lindsley v. Natural Carbonic Gas Co.:*

"* * * the court, by processes of interpretation having its approval, read into the provision an exception or qualification making it *inapplicable where the waters are not drawn from a common source of supply, and also where, if they be drawn from such a source, no injury is done thereby to others having a like right to resort to it.*" (220 U. S. 61, 73.) (Italics ours.)

The statute so construed was held not to violate the due process clause of the Fourteenth Amendment, in that under the *Ohio Oil Company* case, the state under its

police power had the right to regulate the private correlative rights in a common source of supply by prohibiting waste or other conduct injuriously affecting the rights of other private owners having correlative rights in such common source of supply.

The case at bar is quite analogous to, and is controlled by the principle announced in *Herminghaus v. Southern California Edison Company,* 200 Cal. 81. In that case it appeared that the Herminghaus heirs were utilizing the underflow of a stream to which their land was riparian as a natural force in lifting and flowing the surface waters of the stream to their lands which were largely unirrigated, just as appellants here are efficiently using gas in lifting oil to the surface without injuriously affecting the rights of others. It was claimed by the Edison Company, which was impounding and storing the waters of the stream higher up for developing hydro-electric energy to be supplied to the consuming public throughout Southern California, that the use of the underflow of the stream by the Herminghaus heirs in merely lifting the surface waters of the stream to their unirrigated lands, which underflow then went wastefully into the ocean, was *waste,* in that they were not serving a "useful and beneficial purpose."

Sections 11 and 42 of the Water Commission Act attempting to limit the use of water by preventing waste were relied upon by the Edison Company. Section 11 of the Act provided that:

> "All waters flowing in any river, stream * * * excepting so far as such waters have been or are being applied to useful and beneficial purpose upon,

> or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the State of California and subject to appropriation in accordance with the provisions of this act." (200 Cal. 81, 115.)

The act then provided that if any waters are not put to a useful or beneficial purpose for any continuous period of ten years, such non-application shall be deemed conclusive presumption that the use of such portions of such waters on such riparian land is not needed for any useful or beneficial purpose, and such waters were declared to be the property of the state, and subject to appropriation by the general public. Section 42 of the Act provided that the term "useful or beneficial purposes," as to irrigation of uncultivated areas not devoted to cultivated crops, should be construed to mean the use in any one year of not more than two and one-half acre feet of water per acre, the inference being that any additional amount should constitute waste.

With reference to the claim that the use of the underflow of the stream in lifting the upperflow thereof to the levels of entry on the lands of the Herminghaus heirs was waste, the Supreme Court of California said:

> "* * * *The rights which the plaintiffs assert herein inhere* not only in the upper flow of said waters which actually enters upon and permeates and fructifies the soil of riparian lands, but also *in the underflow of said river which lifts the upperflow thereof to the levels of entry upon such lands, and which, having done so, passes by to uplift its peak,*

*in turn, to the levels of lower riparian lands along the course of said river through the plain. The underflow of streams is, with respect to riparian rights therein, no more waste waters than is the upperflow thereof which the riparian owner uses, since without the uplift of the former the outflow and beneficial use of the latter could not exist. Such waters are therefore serving a useful and beneficial purpose in relation to said lands. * * * Had nature not been thus kind; had the plaintiffs originally been obliged at large expense and by artificial means to dig the watercourses, create the channels, and make the connections at various levels for the intake of the waters of the river to which as riparian owners they were entitled, it could not, we think, be reasonably contended that their conduct in so doing was so unreasonable as to justify upper appropriators upon said stream in taking away their riparian rights in the waters of the stream which they had thus artificially and at great expense applied to their lands.* Neither could it be said that the amount of water of said river which is thus lifted to the varying levels of plaintiffs' lands and enters upon and flows over the same by means of the channels which nature has provided is to be held unreasonable merely because it exceeds the volume which the trial court suggested would be sufficient, *if conserved and distributed through expensive artificial methods and appliances. As against appropriators the plaintiffs were not obliged by artificial appliances or otherwise to limit their natural use and enjoyment of the waters of said river,* nor can it be said, as supported by either reason or authority, that a lower riparian owner, as against an upper riparian owner attempting to impound a greater amount of the waters of the stream than that to which he would be entitled under his

> well-defined riparian right, should have cast upon him the burden of limiting by artificial contrivances his natural use and enjoyment of said waters in order that the upper riparian owner may make other and greater uses thereof than those to which he is lawfully and naturally entitled. There is nothing in the record herein tending in any degree to show that the defendants herein ever offered, or would be willing to offer, to reimburse the plaintiffs for any portion of the cost, expense, and outlay which would be required in order to limit the amount of water entering upon plaintiffs' land to the amount thereof indicated by the trial court as susceptible of being made reasonably adequate through such artificial means." (200 Cal. 107-108.) (Italics ours.)

So by direct analogy to the *Herminghaus* case, the use of natural gas in flowing and lifting oil to the surface under conditions not injuriously affecting the rights of other surface owners, is a useful and beneficial purpose in which appellants have a vested right. Neither the legislative nor the judicial branch of the state is justified in depriving them of this right for the purpose of conserving any part of the natural gas so utilized for the future use of consumers or the general public, except by eminent domain proceedings, with prior compensation. The general public and consumers are in the same position as against appellants in this case that the general public and appropriators were in, in the *Herminghause* case, as against riparian owners. The lands in the Santa Fe Springs oil field are privately owned and are a part of a Mexican land grant [R. 169-170], and the state has not, and never did have, any right, title or interest whatever thereto; likewise, consumers and the general public have no interest

therein, and cannot acquire any rights or interests therein or deprive petitioners of any of their vested rights therein except through eminent domain proceedings in which petitioners are first compensated therefor. Therefore, the following extract from the decision in the *Hermighaus* case is applicable and most appropriate:

> *"Neither a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain.* The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others.' * * *" (200 Cal. 81, 112.) (Italics ours.)

Referring to the claims of the Edisor Company that it had gained certain definite additional rights as an appropriator of the waters by virtue of the rights attempted to be conferred upon the public under the provisions of

the so-called Water Commission Act of 1913, sections 11 and 42, the court said:

> "* * * The only possible theory upon which the legislature of the state could be conceded to be empowered to arrogate to itself the right to determine what are the 'useful and beneficial purposes' to which lands held in private ownership shall be devoted or to which those riparian rights which are an integral part and parcel of such lands and which are already vested rights shall be limited in their use and enjoyment to the extent declared in the above-quoted concluding clauses of section 42 of said Water Commission Act is that put forward by certain of the *amici curiae* herein to the effect that such an arrogated act of legislation is justifiable as a proper exercise of the police power of the state. It may be conceded that the phrase 'police power of the state' has, as to its scope and meaning been subjected to a quite severe strain of recent years in the endeavor to so expand it as to cover all sorts of legislation sought to be enacted in the asserted interest of modern progress; but we have yet to be referred to a case wherein it has been judicially so far expanded as to invest the legislative department of this state with arbitrary power to destroy vested rights in private property when such rights are being exercised and such property is being employed in the useful and in nowise harmful production of wealth, and when such use and the product thereof cannot be said or shown to be inimical to public health or morals or to the general welfare; but, on the contrary, must be conceded to be beneficial to each and all of these. * * * To concede that the state legislature has the right arbitrarily to fix as to the latter (uncultivated areas) the amount of water which the riparian

proprietor may take and use thereon would be to concede an equal power to make a like arbitrary fixation in respect to cultivated areas also, entirely regardless of the foregoing elements which are necessarily the determining factors in such fixation. To concede this would be to concede to the legislative department of the state government the arbitrary power to destroy vested rights in private property of every kind and character." (Italics ours.)

200 Cal. 81, 117, 118.

It needs no argument from us to show the close similarity and analogy between the facts and the law involved in the *Herminghaus* case and those involved here. The substances dealt with, water and gas, are similar in that they are both migratory although dissimilar in their uses, and in that the right to the use of the water is limited to use on the riparian land, whereas gas and oil are general articles of commerce, the use of which is not restricted, so that the measure of unreasonable use or waste of the former is by no means applicable to the latter. However, in both cases the owner of the land has a vested right to the natural product as a lifting force, in the one case to raise surface waters to the level of the land for use thereon, and in the other case to flow and lift oil for the owner. In both cases an attempt is made to deprive the landowner of the use of the natural product for the benefit of the general public, in the one case by making it available for appropriation by the general public and in the other case by conserving it for the future use of gas consumers and the general public. In both cases this effort is void and in violation of the constitutional provisions above referred to, unless acquired

through regular eminent domain proceedings involving prior compensation.

Certainly water is even more necessary to the general public than gas. There are no substitutes for the former, while fuel-oil, artificial gas, coal and electric energy can be and are generally used for all the purposes for which natural gas is used. [R. 151-155.] So the case at bar is an even stronger case than is the *Hermingĥaus* case. Moreover, the statute here involved as applied to appellants not only has the necessary effect of depriving appellants of the use of sufficient gas for the useful and beneficial purpose of lifting and producing oil under conditions not injuriously affecting the operations of others in the field, with a huge daily loss to appellants, but it also seriously, permanently and irreparably injures and damages appellants' wells, all without just compensation and without recourse of any sort. [R. 3-12.]

We call attention to *Palmer v. Railroad Commission,* 167 Cal. 163, and *City of San Bernardino v. Riverside,* 186 Cal. 7, which involved the provisions of section 1410 of the Civil Code in which it was provided that "All water or use of water within the state of California is the property of the state of California * * *." The court, however, held that this provision is unconstitutional and could not operate to deprive private persons of their vested water rights and give the same to the state of California. These cases thoroughly demonstrate the great error of the Supreme Court of California in *People v. Associated Oil Company* [p. 29, Supplement to Brief of Appellees on Motion to Dismiss or Affirm], in holding that a public interest in privately owned natural gas

and oil may attach, either by reason of their character as natural resources or by virtue of legislative declaration, or by court judgment.

In *Ex parte Kelso*, 147 Cal. 609, a municipal ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a large portion of the city limits, without any limitation as to the mode of quarrying or any consideration of whether same would result in injury to other property owners in the vicinity, was held to be an arbitrary and unwarrantable interference with the right of private property and invalid, and the petitioner who had been convicted of violation thereof was discharged upon *habeas corpus* for lack of *jurisdiction* of the court to enforce the ordinance. The court said:

> "The case, however, presents a much more serious question. The effect of the ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within certain designated limits of the city and county of San Francisco is to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership,—viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of. While the use to which a man may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as may be necessary to protect others from injury from such use, it is of course elementary that the enjoyment of one's property cannot be interfered with or limited arbitrarily. As is said in Tiedeman's Limitations of Police Power, the next thing to depriving a man of his property is to circumscribe him in its use. A limitation of the use

pro tanto deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law. (Secs. 122, 122a.) While in the exercise of its police power the state may limit or regulate the use, any such limitation or regulation must find its justification in the necessity for the protection of the *legal rights* of others. If it does not, it is an unwarrantable invasion of property rights, against which the courts will protect. Whether or not a certain limitation or regulation is essential is largely a question for the legislative department, to be determined with reference to all the existing circumstances, and the courts will not ordinarily interfere where it can be seen that the regulation has some proper relation to an object within the domain of the police power of the state, which, as stated by Mr. Cooley, includes all regulations having reference to 'the comfort, safety or welfare of society.' But regulations which transcend these objects cannot be upheld by the courts as legitimate police regulations. (See *Ex parte Dickey,* 144 Cal. 234, 236 [103 Am. St. Rep. 82, 77 Pac. 924].)

"Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place of deposit. Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others, but it cannot be

doubted that rock and stone may under some circumstances be so severed from the land and removed as not in the slightest degree to inflict *any injury which the law will recognize. So far as such use of one's property may be had without injury to others it is a lawful use which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power.*" (Italics ours.)

147 Cal. 609, 611-612.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 67 L. ed. 322, was a bill in equity brought to prevent the coal company from mining under the property of the plaintiffs in such a way as to remove the supports and cause a subsidence of the surface under their house. The plaintiffs claimed under a deed executed by the coal company which reserved the right to remove all of the coal under the land. The plaintiffs claimed that whatever may have been the rights of the coal company under the deed were taken away by the Kohler Act of the Pennsylvania Legislature. This statute prohibited the mining of anthracite coal in such a way as to cause the subsidence, among other things, of any structure used as a human habitation, with certain exceptions. The statute is admitted to destroy previously existing rights of property and contract as applied to that case, and the question presented was "whether the police power can be stretched so far." The court said:

"Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield

to the police power. *But obviously the implied limitation must have its limits or the contract and due process clauses are gone.* One fact for consideration in determining such limits is the *extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.* * * *

"It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case: *'For practical purposes, the right to coal consists in the right to mine it.'* (Com. *ex rel. Keator v. Clearview Coal Co.*, 256 Pa. 328, 331, L. R. A. 1917E, 672, 100 Atl. 820.) *What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.* This we think that we are warranted in assuming that the statute does.

"* * * The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. Hairston v. Danville & W. R. Co., 208 U. S. 598, 605, 52 L. Ed. 637, 639, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. * * *

"We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall." (Italics ours.)

67 L. ed. 322, 325, 326.

The attorney general of the state, the city of Scranton, and the representatives of extensive interests, took part in the argument, and the general validity of the statute was involved. While the right which was invaded was a reserved right to mine coal, the principle of the decision applies with full force, because in the case at bar petitioners have the vested right to produce the oil and gas under their land under conditions which under the admitted facts do not injuriously affect the correlative rights of other surface owners in the field, which right is a part of the land itself, and is a property right. The value of this right, for all practical purposes, consists in the right to exercise it without interference. The effect and operation of the statute in the case at bar upon appellants is the subject of the next point of the argument.

The Supreme Court of California, in its opinion in *People v. Associated Oil Company,* in support of its at-

tempt to show that the legislative power extends to conserve privately owned natural resources for the benefit of the general public as consumers, cites *Boone v. Kingsbury,* 206 Cal. 148, 181, to show "the importance of petroleum and gas in industry" [p. 33, of "Supplement to Brief of Appellees on Motion to Dismiss or Affirm Judgment"], and states [p. 39] that

> "Obviously, the enactment is an effort on the part of the Legislature to conserve for the present and future needs great natural resources *in which the people of the state are interested.*"

It is well settled by the decisions of this court, however, that the mere fact that the Legislature or the public may feel some concern as to the continued existence or the continued supply of gas for industrial or domestic consumption by the inhabitants of the state as consumers, does not make the business of the companies producing oil and gas a "business affected with a public interest" or justify its regulation for the benefit of the general public as consumers. This court, in *Williams v. Standard Oil Company,* 278 U. S. 235, held invalid a statute of Tennessee purporting to authorize agencies of the state to fix prices at which gasoline might be sold within the state, because the effect was to deprive vendors of such gasoline of their property without due process of law, in violation of the Fourteenth Amendment. It was urged most strenuously that on account of the general use of gasoline for industrial purposes the business of dealing therein was "affected with a public interest." The court, however, held to the contrary, saying:

> "In support of the act under review it is urged that gasoline is of widespread use; that enormous quan-

tities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case."

49 Sup. Ct. Rep. 141, 142-143.

The court reviews a great many authorities, and referring to the term "affected with a public interest," said:

"* * * As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. Tyson & Bro.—United Theatre Ticket Offices v. Banton, *supra,* p. 434 [71 L. Ed. 724, 58 A. L. R. 1236, 47 Sup. Ct. Rep. 426.] Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. *Id.* p. 430. The meaning and application of the phrase are examined at length in the Tyson case, and we see no reason for restating what is there said."

49 Sup. Ct. Rep. 141, 142.

In *Tyson & Bro. etc. v. Banton*, 273 U. S. 418, 71 L. Ed. 718, this court said:

> "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood.
>
> "The characterizations in some decisions of businesses as 'quasi public' (People v. King, 110 N. Y. 418, 428, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245) 'not "strictly" private (Aaron v. Ward, 203 N. Y. 351, 356, 38 L. R. A. (N. S.) 204, 96 N. E. 736) and the like, while well enough for the purpose for which they were employed, namely, as *a basis for upholding police regulations in respect of the conduct of particular businesses, cannot be accepted as equivalents for the description 'affected with a public interest,' as that phras is used in the decisions of this court as the basis for legislative regulation of prices. The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.*
>
> "And, finally, *the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon*

> *the question of the validity of the regulation.* The matter is one which is always open to judicial inquiry. Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 536, 67 L. ed. 1103, 1108, 27 A. L. R. 1280, 43 Sup. Ct. Rep. 630." (Italics ours.)
>
> 71 L. Ed. 718, 722-723.

Counsel for appellees will no doubt seek to distinguish these cases on the theory that they relate only to price fixing statutes, but it will be noticed from the foregoing extract that the power to fix prices is "a more definite and serious invasion of the rights of property," and "its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on."

In *Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522, 67 L. Ed. 1103, the statute involved was the compulsory arbitration statute of Kansas, and the substance of the opinion holding the statute void is thus stated in the syllabus:

> *"The attempt by a state to create continuity of such businesses as food and clothing production and mining,* by requiring employers to pay wages fixed by an industrial court, and forbidding the employees to strike, *violates the provision of the 14th amendment to the federal constitution,* forbidding deprivation of liberty and property without due process of law."

Chief Justice Taft, delivering the opinion of this court, said:

> "The necessary postulate of the Industrial Court Act is that the state, representing the people, is so

much interested in their peace, health, and comfort that it may compel those engaged in the manufacture of food and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the state, if they cannot agree. * * *

"If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business."

262 U. S. 522, 533-534, 539.

Since the necessary effect of the statute as applied to appellants is to compel appellants and other operators in Santa Fe Springs to conserve natural gas for the benefit of the general public, and thus to require them to continue in the business of producing oil (and also gas), for this additional reason under the case last cited it constitutes a violation of the due process clause of the fourteenth amendment of the United States Constitution.

That the mere character of oil and gas as natural resources does not vest the public with any interest therein, is further shown by *Moore v. Small,* 17 Cal 199. In that case it was contended that the title to all minerals became vested in the state of California upon its admission into the union as an incident to sovereignty upon the theory that this followed "from the excellency of the thing." The court held, however, to the contrary.

POINT E.

The Statute as Applied to Appellants Constitutes a Taking of Appellants' Property for a Public Use Without Compensation and Without Due Process of Law, in Violation of the Fourteenth Amendment.

From the admitted and undisputed facts, shown by the record, there can be no doubt but that the California statute, as construed and applied to appellants, constitutes a taking of appellants' property for a public use without compensation and therefore a taking without due process of law, in violation of the fourteenth amendment. The demurrer to the petition for writ of prohibition admits the facts alleged in the petition, including the facts alleged in paragraphs 7 and 8, and that same were established by the uncontradicted evidence introduced upon the hearing of the preliminary injunction. [R. 3-8.]

Since these facts have already been stated and reviewed (pp. 6-19 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm"), and the proposition has been thoroughly argued under Point E of said brief (pp. 46-54), in the interest of brevity reference is hereby made thereto. Among other things, it is there established that the admitted sole purpose of the decrease in the allowed gas production to appellants was to conserve such natural gas for the benefit of the general public for light, heat and fuel [R. 14], and it is shown that this appears from the face of the provisions of the order itself. It cannot be contended that under such circumstances the allegation that such was the sole ground of the order is a

conclusion not admitted by the demurrer. (See *Regan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 401-402, where a similar situation existed.) We need only point out here the additional fact that under the uncontradicted evidence before the Superior Court it appeared that no natural gas is being produced by any of appellants in a quantity more than is reasonably or necessarily required in the production of oil therefrom in accordance with efficient methods and appliances [R. 4, 7], and that each of the wells of appellants in said field is so operated that it does not injuriously affect the operations of others owning and/or operating wells in said field. [R. 7-8.]

Since the operation and effect of the state statute involved, as applied to appellants, is not a regulation of private correlative rights in a common source of supply by preventing waste or other conduct by one or more of them which injuriously affects the correlative rights of other surface owners in the common source of supply, but is directed to the curtailment of production itself for the benefit of the consuming general public, it is, under the authorities cited under Point D of this and our previous brief, repugnant to the due process clause of the Fourteenth Amendment.

Furthermore, the California statute shows on its face that it was enacted for the benefit of the general consuming public and not for the purpose of regulating the private correlative rights of the surface owners in an oil and gas field. Section 8b provides that: "The unreasonable waste of natural gas * * * whether before or after the removal of gasoline from such natural gas, is hereby declared to be *opposed to the public interest*, and

is hereby prohibited and declared to be unlawful." Likewise, section 21a declares: "The charges hereinafter provided for are directed to be levied * * * to provide a means by which to supervise and protect deposits of petroleum and gas within the state of California, *in which deposits the people of the state of California are hereby declared to have a primary and supreme interest.*"

Since, under the authorities cited under Point D of this and our former brief the legislative power does not extend to curtailment of production of oil or gas for the benefit of the general consuming public, but is limited to regulation of the private correlative rights of the surface owners by preventing waste or other conduct by one or more of them which injuriously affects the private correlative rights of other owners in the common source of supply, it follows that the statute *on its face* is also repugnant to the due process clause of the Fourteenth Amendment.

POINT F.

Under the Admitted Facts, the Extent of the Invasion of Appellants' Property Rights Is So Great, So Arbitrary, So Oppressive and Unreasonable, That It Goes Too Far Under the Police Power of the State.

In addition to the argument, citations to the typewritten record and citations contained under this point at pages 55-60 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," we wish merely to call the court's attention to the following extract from the recent opinion of this court in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 121:

"* * * Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Adams v. Tanner, 244 U. S. 590, 594, 61 L. ed. 1336, 1342, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; Meyer v. Nebraska, 262 U. S. 390, 399, 400, 67 L. ed. 1042, 1045, 1046, 29 A. L. R. 1446, 43 Sup. Ct. Rep. 625; Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 513, 68 L. ed. 813, 826, 32 A. L. R. 661, 44 Sup. Ct. Rep. 412; Norfolk & W. R. Co. v. Public Serv. Commission, 265 U. S. 70, 74, 68 L. ed. 904, 907, 44 Sup. Ct. Rep. 439; Pierce v. Society of Sisters, 268 U. S. 510, 534, 535, 69 L. ed. 1070, 1077, 1078, 39 A. L. R. 468, 45 Sup. Ct. Rep. 571; Weaver v. Palmer Bros. Co., 270 U. S. 402, 412, 415, 70 L. ed. 654, 657, 658, 46 Sup. Ct. Rep. 320; Tyson & Bro.—United Theatre Ticket Offices v. Banton, 273 U. S. 418, 442, 71 L. ed. 718, 727, 58 A. L. R. 1236, 47 Sup. Ct. Rep. 426."

All of the cases cited by the Supreme Court of California and by the District Court of Appeal of California are clearly distinguishable from the case at bar and are in no way inconsistent with the position of appellants herein. Some of them have already been referred to in this and our former brief in this court.

Marrs v. City of Oxford, 32 Fed. (2d) 134, in which a petition for *certiorari* was denied by this court October 21, 1929, involved a city ordinance which limited the number of oil wells within the city limits, and was upheld as being within the police power on account of the danger of fires

in the business and residence districts and the noise and other objectionable features. These reasons would have been sufficient for the entire prohibition of any oil wells within the city limits.

In *Oxford Oil Company v. Atlantic Oil Producing Co.*, 22 Fed. (2d) 597, in which *certiorari* was denied by this court (72 L. Ed. 1000), the cause of action was against the individual members of the Railroad Commission, certain of its employees and the lessee of an adjoining tract to recover damages which the plaintiff alleged were sustained as the result of an enforcement of a rule of the Railroad Commission. The complaint showed that the plaintiffs were the owners in fee of a long, narrow strip of land upon which they were permitted to drill only four wells. A general demurrer to the complaint was sustained, the court holding that in no event would the state officers be personally liable. It there appeared that the operation of the plaintiffs would injuriously affect the rights of other surface owners, whereas in the case at bar the contrary appears. The statute and the rule were enacted before any wells were drilled, and did not involve an already developed oil field. This last statement is true of all of the cases cited by appellees.

A denial by this court of *certiorari* in the two cases last referred to imports no opinion by this court on the merits of those cases (*United States v. Carver*, 260 U. S. 482), and does not give to either case the character of a precedent in this court (*Hamilton Brown Shoe Co. v. Wolff Bros. & Co.*, 240 U. S. 482).

Commonwealth v. Trent (Ky. 1903), 73 S. W. 390, is distinguished by the fact that defendants were operating

its gas wells under pretense of manufacturing lampblack, but really with the unlawful purpose of wasting the gas *without any utilization whatever* and destroy the gas territory in Meade county, in violation of the rights of other owners having gas wells penetrating the same reservoir. The court said:

> "The defendants had the right to use the gas in any sort of lawful business done or attempted to be done in good faith, but if the use of the gas was a mere pretext for wasting it they are none the less responsible than if they had allowed it to escape at the well."
>
> 73 S. W. 392-393.

This was a clear case of wilful destruction of property without any utilization and without benefit to the person accomplishing it. It clearly has no application to the facts in the case at bar where the natural gas produced by petitioners is serving the highly useful and beneficial purposes of producing oil in a lawful business, the manufacture of casing-head gasoline, and for heat and fuel, and where petitioners are not injuriously affecting the rights of others. The well involved in *Commonwealth v. Trent* was a pure gas well, and the statute, by its terms, did not apply to a well which was producing oil. Furthermore, under the statute if the gas was utilized for any beneficial purpose by the operator, such use was not prohibited, and hence the facts of our case would not be a violation of the Kentucky statute.

State v. Carson Carbon Co., 162 La. 781, 111 So. 162, is a case arising in Louisiana where under the constitution of that state oil and gas are natural resources belonging

to the state and not to the owners of the surface of the land overlying the oil and gas deposits. The state being the owner, it was "merely exercising the proprietary rights of the state in its natural resources." It could absolutely prohibit the taking of any oil or gas, and no divesting of private property under such a condition can be conceived (*State v. Thrift Oil & Gas Co.*, 162 La. 165, 110 So. 188; *Geer v. Connecticut*, 161 U. S. 519, 525). Accordingly, the state was held to have the right, under the constitution of Louisiana, to regulate and impose conditions as to the amount of natural gas from any well which might be consumed in the production of carbon black.

In *Walls v. Midland Carbon Co.*, 254 U. S. 300, a Wyoming statute was designed to prohibit the use of natural gas in the manufacture of carbon black under conditions where it injuriously affected the correlative rights of other surface owners overlying a common source of supply. The statute applied only to gas produced from wells located within ten miles of a town and the facts showed that the gas being produced and used in the manufacture of carbon black involved a greatly disproportionate taking from the common source of supply and injuriously affected the operations of other surface owners who were supplying the inhabitants of a town within a ten-mile radius with light, heat and fuel. No oil was involved, the deposit being one of pure natural gas. As we have previously pointed out (pages 38-40 of our former brief), the statute was upheld on the basis of the doctrine of the *Ohio Oil Company* case, namely, the regulation and protection of the private cor-

relative rights of the surface owners by the prevention of waste or other conduct of one or more of them injuriously affecting the rights of others in a common source of supply.

It has been suggested that the Indiana statute, which prohibited the escape of any natural gas for a longer period than two days next after a gas or oil well is brought in, and which was upheld by this court in *Ohio Oil Company v. Indiana,* 177 U. S. 190, is a greater invasion of property rights than is involved in the California statute, and that, for this reason, the California statute does not go too far to be a valid exercise of the police power. This suggestion, however, ignores the great difference in the underlying facts between the two cases. In the Indiana case there was a great deposit of *pure natural gas* (not mingled with any oil) in a subterranean reservoir underlying nine counties, which was discovered in 1886 and which had been highly developed so that a great industrial community had been built up in these counties during the well-known "gas craze" existing during this period. This reservoir of natural gas had well-defined limits, and *all* of the operators in the field were engaged in the business of producing *natural gas* for light, heat and industrial purposes which were the chief and primary purpose of the natural gas and for which it had a great value. The demand for the gas in Indiana for such purposes far exceeded the supply. In 1897, some ten or eleven years after the discovery of this pure natural gas reservoir and after the drilling of a great many natural gas wells, oil was discovered in a lower stratum of mingled oil and gas. The Ohio Oil Company was one of

just a few companies exploiting this new discovery of oil. It was interested only in the production of oil, and permitted the gas which was found with the oil, and also the gas in the overlying pure natural gas reservoir, to escape into the air. This resulted in a tremendous injury to the great host of other operators in the field operating pure gas wells and interested only in the production of natural gas which was the greatly predominant industry. The admitted facts were that the gas percolated freely through a stratum of rock known as "Trenton rock," so that a well penetrating the natural gas reservoir might draw off the entire volume of gas in the reservoir. The Indiana decisions show that the gas pressure throughout the gas reservoir underlying nine or ten counties was the same. This court therefore said:

> "* * * From this it must necessarily come to pass that the entire volume of gas and oil is in some measure liable to be decreased by the act of anyone who, within the superficial area, bores wells from the surface and strikes the reservoir containing the oil and gas."
>
> 177 U. S. 190, 201.

And so the statute was upheld because, in truth and in fact, the operations of the Ohio Oil Company were highly injurious to the great host of other operators in the field operating pure gas wells, and solely upon this theory of protecting the private correlative rights of other surface owners or operators so injuriously affected.

In California and in the case at bar the underlying facts are fundamentally different and in many respects are diametrically opposed to those in the Indiana case. In-

stead of the demand for natural gas far exceeding the supply, in California the supply of natural gas greatly exceeds the demand. The Supreme Court of California took judicial notice of this in *People v. Associated Oil Company* [see middle of page 36, "Supplement to Brief of Appellees on Motion to Dismiss or Affirm"]. In California the gas and oil do not freely move and percolate throughout the field, but this court judicially knows, as stated in *Chandler v. Hart,* 161 Cal. 405, 418:

> "* * * Each well is separate from every other and by means of it the oil can be taken only from a limited area of four or five acres immediately surrounding it. For this reason the extraction of oil from the whole of a large tract granted by an ordinary oil lease requires, not one 'stock,' or one well, as a means of access to the whole deposit of oil, but a separate and independent well upon every few acres of the oil-bearing territory. The tract must be dotted with wells, each as separate and distinct in its installation and operation as if owned by different persons."

Scientific knowledge of underground conditions under which oil and gas exist has increased so greatly since the time of the *Ohio Oil Company* case and the earlier cases, that it is now generally recognized that such deposits in their original state in an undrilled field are stationary and that there is no lateral movement; also that the extent of the drainage of oil and gas is very limited although it varies somewhat, depending on the gas pressure, the porosity of the formation, the viscosity of the oil, and other factors, and that these substances do not percolate freely underground. (*Mills and Willingham on Oil and*

Gas, pp. 18 and 26; *Chandler v. Hart,* 161 Cal. 405, 418; *Bodcaw Lumber Co. v. Goode* (Ark.), 254 S. W. 345, 29 A. L. R. 518; *Osborn v. Arkansas etc. Oil & Gas Co.,* 103 Ark. 175.) Furthermore, in the case at bar we have no stratum of pure natural gas overlying an oil and gas stratum. We have not, therefore, in the Santa Fe Springs oil fields a large number of operators or any operator producing gas for light, heat and industrial purposes from pure natural gas wells whose operators are interferred with by the operations of a comparatively few oil companies interested only in the production of oil as was the case in Indiana. The admitted and uncontradicted facts adduced in the Superior Court show that

> "* * * *all* of the owners and/or operators of each and every well in said field which are and have been producing oil and gas, are operating such wells primarily and chiefly for the oil produced and to be produced therefrom, and that the production of gas therefrom is and has been incidental and a necessary result; that it would not be possible to produce oil from any of the flowing wells in said field without the production of natural gas; that the chief and primary value of the natural gas produced from the flowing wells in said field is in flowing oil to the surface * * *." [R. 4.]

It also appears from the uncontradicted evidence

> "* * * that the use of natural gas as a propelling force in moving and producing oil is prevalent in the state of California and is according to the universal custom of the various localities throughout California in which oil and natural gas are produced from flowing wells * * *." [R. 3.]

In view of the above mentioned conditions in California, and the further fact that without the utilization of natural gas the dominant and important oil industry of the state cannot exist, and having in mind that the legislature of this state, in enacting the present statute did not follow the stringent Indiana statute but attempted to prohibit only the unreasonable waste of natural gas, it is apparent that a statute such as the Indiana statute would not be constitutional under the conditions existing in California. The extent of the invasion of property rights would go too far, and would require the exercise of the right of eminent domain. Local conditions must be taken into account in determining the extent of the police power. (*Terrace v. Thompson,* 263 U. S. 197.) The Indiana statute, after the oil development had proven to be of commercial importance, was regarded as too drastic and so was repealed shortly after the decisions in the *Ohio Oil Company* case. Furthermore, on page 61 of the brief which appellees' counsel filed in the California District Court of Appeal, it is admitted that if the California statute had prohibited the escape of any natural gas (as did the Indiana statute), it "would have been unconstitutional and void for the reason stated," viz., in that it would be "unreasonable, impossible of performance and void."

The record further shows without contradiction

> "* * * that no natural gas is being produced by any of petitioners from any oil well or wells in said oil field in any quantity exceeding a reasonable proportion to the amount of oil produced from the same well or wells or any quantity more than is reasonably or necessarily required in the production of oil therefrom, in accordance with efficient methods and appliances * * *." [R. 4.]

It further appears from the uncontradicted evidence

> "* * * that *each of the wells of petitioners in said Santa Fe Springs oil field is efficiently operated and is so operated that it does not injuriously affect the operations of others owning and/or operating wells in said field;* that the gas-oil ratio of each well producing oil and gas is a fair index to the efficiency of such well in the reasonable utilization of natural gas in the production of oil; that *the gas-oil ratio of the wells of petitioners is the third lowest amongst the nine largest producers of oil in said Santa Fe Springs oil field* * * *." [R. 7.]

The record also shows without contradiction that the quantity of natural gas which appellants were utilizing in producing oil without injuriously affecting the operations of others at the time of the preliminary injunction amounted to 57,120,000 cubic feet per day, and that the market value of the oil produced daily was $31,286.40 [R. 5-6]; that said natural gas was utilized a *second* time in the manufacture of casinghead gasoline of the approximate value of $3,000 per day [R. 7]; that the greater part of the resulting dry natural gas which remained was further utilized a *third* time for fuel, field and other purposes in the operations of appellants, and so much as could be sold was sold at the prevailing price of 5¢ per thousand cubic feet [R. 7, 12]; that there was and is no further available means to any of appellants for any further utilization of the remaining dry gas and *such remaining dry gas had and has no market value* [R. 7]; that notwithstanding petitioners' diligent efforts, none of them were able to sell or even give away the same [R. 7]; that gas must be used as produced, and

cannot be stored except at prohibitive cost [R. 6, 154-156]; that by reason of the premises appellants are compelled, after making the aforesaid manifold utilizations thereof, to release and permit the remaining residual dry gas to escape into the air [R. 7]. Notwithstanding these admitted facts, the record shows that the Superior Court, acting under the supposed authority of the state statute here invoked, and admittedly *"for the sole purpose of conserving such natural gas for the benefit of the general public"* [R. 14], made its preliminary injunction by the terms of which appellants were required to curtail the daily gas production by more than 50%. The preliminary injunction itself shows upon its face that this curtailment in allowed gas production was not based upon any consideration of the proper utilization of gas by appellants or any of the other operators in the field in producing oil, or upon any waste or other conduct of one or more of the operators in the field injuriously affecting the private correlative rights of other owners and operators in the field, but was based solely upon the market demands or gas outlets for such gas for use above ground by the general public for light, heat and fuel, and this was for the sole purpose of curtailing the gas production in excess of such market demands for the future use of the general public for light, heat and fuel [R. 181-187; see also pages 10-12, 52-54, of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm"]. The effect of this enforced decrease in the amount of gas which appellants were producing admittedly without injuriously affecting the operations of others in the field was to decrease appellants' daily oil production by 9,205 barrels per day, of

a value in excess of $12,500 per day [R. 8, 12], to say nothing of the daily loss in the value of casinghead gasoline manufactured from its gas production, and the killing and/or permanent injury and damage to many of its wells, having an average cost of $150,000 each, and the permanent loss of many of such wells [R. 7-12]. All of this tremendous loss to appellants is without any compensation or recourse to appellants whatever therefor, and is all made for the sole purpose of conserving gas admittedly produced without injuriously affecting the rights of other surface owners in the field, for the future use and benefit of the general public as consumers for light, heat and fuel.

It is respectfully submitted that these facts show a situation vastly different from the underlying facts and situation existing in the case of *Ohio Oil Company v. Indiana.* The effect and operation of the California statute, instead of protecting the use of all the surface owners against the waste or other conduct of one or more of them injuriously affecting the others, which this court said in *West v. Kansas Natural Gas Company* is "true conservation" (221 U. S. 254), is to take away and deprive appellants and other surface owners and operators of their right to sufficient gas to produce oil under conditions not injuriously affecting the rights of other operators in the field in order "to reserve it for the future purchasers and use within the state on the ground that the welfare of the state will thereby be subserved." As stated by this court in *West v. Kansas Natural Gas Co.,* "the statute finds no justification in such purpose for its interference with private property" (221 U. S. 260).

Without stopping to review the other cases, it is sufficient here to say that the statute involved in each was sustained either upon the basis of protecting private correlative rights of one or more of the surface owners by preventing waste or other conduct of one or more of them injuriously affecting the rights of others of them in a common source of supply, or because one surface owner was wilfully destroying gas without putting the same to any beneficial use whatever under conditions injuriously affecting the rights of others in a common source of supply, or because the particular ordinance or statute was necessary for the protection of the public safety.

In the case at bar there is no room for any claim that the statute as applied to appellants is for the purpose of protecting the private correlative rights of other surface owners in a common source of supply, but on the contrary, under the admitted and undisputed facts shown by the record, the sole ground for the gas curtailment complained of is for the purpose of conserving the natural gas so curtailed for the future use and benefit of the general public as consumers, and under the admitted facts of this case the extent of the invasion of appellants' property rights is so great, so arbitrary, so oppressive and so unreasonable, that it goes too far under the police power of the state and requires the exercise of the power of eminent domain, with compensation to appellants (see pages 46-60 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm").

POINT G.

The Statute Involved Is Void for Uncertainty and Lack of a Sufficiently Definite Standard of Conduct Under the Due Process Clause of the Fourteenth Amendment.

This point is fully covered and thoroughly argued with abundant citations at pages 61-112 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm", where all of the arguments advanced by counsel for appellees as well as by the state courts are answered, and reference thereto without repetition here is made, in the interest of brevity.

We wish here merely to show that the statement contained in the opinion of the Supreme Court of California in *People v. Associated Oil Company,* that "In seven states of the Union legislation making unlawful the unreasonable waste of natural gas has been upheld," is erroneous (see page 29, Supplement to Brief of Appellee on Motion to Dismiss or Affirm). An examination of the statutes of the states there referred to will disclose that in not one of those states is there any statute like that in California which merely prohibits "the unreasonable waste of natural gas" without any definition, standard or guide as to what is intended to be prohibited. On the contrary, the statutes involved in those states were definite and specific in their terms as to what was intended to be prohibited, as will be shown by the following brief review:

Ohio Oil Company v. Indiana, 177 U. S. 190, 44 L. Ed. 729, involved the Indiana statute—which did not use the term "waste" at all. Under that statute it was made unlawful "to allow or permit the flow of gas or oil from any such well *to escape into the open air* without being con-

fined within such well or proper pipes or other safe receptacles, for a longer period than two days next after the oil or gas shall have been struck in such well." This is definite and specific.

In *Walls v. Midland Carbon Co.*, 254 U. S. 300, 65 L. Ed. 276, the statute was quite specific and definite in declaring that

> "'The use, consumption or burning of natural gas * * * without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes is hereby declared to be a wasteful and extravagant use of natural gas and shall be unlawful, when such gas well or source of supply is located within 10 miles of any incorporated town or industrial plant."
>
> 65 L. Ed. 280.

What could be more definite and specific?

In *State v. Lebow* (Kans.), 280 Pac. 773, the court held all the uncertainty was removed by the context of the statute. The first clause of the statute referred to the escape of oil refuse and salt water, using the words "in the immediate vicinity" of an oil well, and the second clause required it to be safely kept in pipe lines and tanks so as to prevent the escape thereof (see p. 176, middle of second column).

In *Oxford Oil Company v. Atlantic Oil Producing Co.*, 22 Fed. (2d) 597, an act of the Texas legislature passed in 1919 contained a provision that the railroad commission should make and enforce rules and regulations for the *drilling* of wells and preserving a record thereof, and providing that it shall be its duty to require such wells to be

drilled *in such manner as to prevent injury to adjoining property*, and to "prevent oil and gas and water from *escaping from the strata in which they are found into other strata,*" and to establish rules and regulations therefor (Laws of Texas, 1919, chapter 155). Thus the statute was definite and certain. Furthermore, the statute, unlike the one here, authorized the commission to establish, and it did establish, rules and regulations which provided in advance a definite standard for the public to go by. Such rules and regulations were limited to the above named specific purposes, so that definite guides and rules for the guidance of the commission were set forth in the statute and the commission not left to roam at large unguided and uncontrolled.

State v. Carson Carbon Company, 162 La. 781, 111 So. 162. The first section of Article VI of the Louisiana Constitution required the legislature to enact all laws necessary to protect, conserve and replenish the natural resources of the state. The court, referring to this constitutional provision, said:

> "* * * That does not mean that the legislature may not delegate to the Commissioner of Conservation the authority to ascertain and determine the *facts* according to which the conservation *laws enacted by the legislature* are to be applied and enforced."

It was claimed that the provisions of the statute authorizing the Commissioner of Conservation to fix and determine what percentage of natural gas produced by each well might be used in the manufacture of carbon black were unguided and uncontrolled. The court said.

> "* * * We have no occasion for deciding the question in this case. In authorizing the Commis-

sioner of Conservation to fix the percentage, in the second section of the Act 91 of 1922, *the legislature itself limited the percentage by declaring that it should be not less than 15 or more than 20 per cent of the potential capacity of any well.* Therefore, as far as the maximum allowance of 20 per cent goes, the legislature itself fixed it * * *."

111 So. 162, 165, 166.

Commonwealth v. Trent, 117 Ky. 34, 4 Ann. Cas. 209, 77 S. W. 390, was also definite and specific as to what was and what was not prohibited. The act provided that

"* * * any person * * * in possession * * * of any well in which petroleum, natural gas or salt water has been found, *shall, unless said product is sooner utilized, within a reasonable time, not, however, exceeding three (3) months from the completion of said well, in order to prevent said product wasting by escape, shut in and confine the same in said well until such time as it shall be utilized: provided, however, that this section shall not apply to gas escaping from any well while it is being operated as an oil well, or while it is used for any fresh or mineral water."*

77 S. W. 390.

In *Quinton Relief etc. Co. v. Corporation Commissioner of Oklahoma,* 224 Pac. 156, 101 Okla. 164, the phrase employed was "wasteful utilization of gas." The Oklahoma statute defined the word "waste" and provided that, in addition to its ordinary meaning, it should include the escape of natural gas in commercial quantities into the open air, the intentional drowning with water of a gas stratum capable of producing gas in commercial quantities, underground waste, permitting any natural gas well to

wastefully burn, and the wasteful utilization of such gas. The court held that the statute did not repeal a prior act in which the purposes for which natural gas may be utilized were defined. The court, reading both statutes together, held that since both the term "waste" and the term "utilization" had been defined by the statute the phrase "wasteful utilization" of natural gas did provide a definite standard. If the California statute had provided the purposes for which natural gas may be used, and had defined what shall constitute waste, as did the statute of Oklahoma, and had defined what constitutes "*unreasonable* waste," there would be no question of a lack of a definite rule or standard.

This concludes the states referred to by the Supreme Court of California as having statutes prohibiting "the unreasonable waste of natural gas." The foregoing analysis shows that none of the statutes used any such vague and indefinite expression, but on the contrary the language of each of the statutes was definite and certain. Yet so vague and uncertain is the California statute, and so flexible is the possible scope and limits of the expression "unreasonable waste of natural gas," that the Supreme Court of California has referred to *all* of the statutes of these other states as "statutes to prevent the unreasonable waste of natural gas." These statutes are instructive, however, as showing that it was not impossible or impractical for the legislature to enact a statute prescribing definitely a rule or standard whereby the citizens in this state could determine what is and what is not prohibited. The California statute is so broad and loose that it cannot be ascertained from the statute in advance

what may or may not be done. It leaves the subject wide open for any rule or standard which a jury, or the Supervisor of Oil and Gas, or the court, may later prescribe. This does not answer the test of valid legislation, for under all the authorities the mandate of the statute must be

> "so clearly expressed that any ordinary person can determine in advance what he may and may not do under it." (Judge Brewer in 35 Fed. 876.)

The California statute is so vague and indefinite as to what can and cannot be done under it that the owners and operators of oil and gas wells are put to the hazard of determining *in advance* and guessing at their peril what they can and can not do under the statute at the time they are called upon to act: (a) in putting down an oil well, at a cost of approximately $150,000; or (b) in deciding whether or not they could safely make a contract for future delivery of oil; or (c) in taking any other step of omission or commission. If they guess wrong they not only subject themselves to the penal sections of the statute (Sec. 21), but also to a prohibitory order of the Supervisor of Oil and Gas, under section 14a, or of a court, under section 14b, depending, not upon any standard or guide prescribed in the statute and known in advance, but upon a standard enacted later by a jury, or administrative officer, or a court, after the act has been committed, and as to which standard nothing can be known in advance. The penalty is just as severe and disastrous for all practical purposes whether it be penal in character or a prohibitory order requiring the shutting down or severe curtailment of the wells or inability to fulfill oil contracts, which results in far greater loss than any fine which might be imposed under the penal provisions of the statute.

Without attempting to review the many authorities cited in our former brief under this heading, it is sufficient here to cite extracts from only two of the opinions of this court:

In *Connally v. General Construction Co.*, 271 U. S. 385, 70 L. Ed. 322, 328, it is said:

> "* * * *And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.*"

In *Small v. American Sugar Refining Company*, 267 U. S. 233, this court said:

> "The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. *The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.* It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. * * *"
>
> 267 U. S. 239.

In the recent opinion of a three-judge statutory federal court, *Champlin Refining Co. v. Corporation Commission of the State of Oklahoma*, decided August 5, 1931, and quoted in full in the issues of the United States Daily for August 15, 1931, and August 20, 1931, which case is pending in this court (Case No. 1014), both the majority

and minority opinions are agreed that the oil conservation statute of Oklahoma there involved is too indefinite and uncertain to be sustained as a penal statute under the due process clause of the Fourteenth Amendment. The Oklahoma statute, which is set out in full in note 1 of the opinion, prohibited the production of crude oil or petroleum "in such manner and under such conditions as to constitute waste," and by section 3 of the Act the term "waste" is defined as follows:

> "That the term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands. The Corporation Commission shall have authority to make rules and regulations for the prevention of such wastes, and for the protection of all fresh water strata, and oil and gas bearing strata, encountered in any well drilled for oil."

We quote the following brief extract from the opinion:

> "The statute has a dual aspect: First, as a penal statute to prevent waste and to protect the coequal rights of the several owners of land situate over a common pool of oil and gas to take from the common source of supply; and second, a regulatory statute to be supplemented by rules, regulations and orders of the Commission to accomplish the same ends.
>
> "The penalties provided are for violations of the statute and no penalties are provided for violations of the rules and regulations promulgated by the Commission.
>
> "We are of the opinion that the statute is too indefinite and uncertain to be sustained as a penal statute. Smith v. Cahoon, Sheriff, 283 U. S. .....

An oil operator should not be required at the peril of severe criminal penalties to determine in the operation of his oil and gas wells whether he is committing economic waste or producing in excess of reasonable market demands because such terms are not defined in the act and are of uncertain and doubtful meaning. Likewise, a producer from a common source of supply should not be required to determine at the peril of such penalties whether he can operate at full production without committing economic waste or producing in excess of reasonable market demands.

"Furthermore, it is unreasonable to require an operator to choose between two approved methods of operation, the results of which cannot be forecast with precise accuracy, in dealing with the ordinary problems confronted in the drilling and operation of oil and gas wells, at the peril, if he makes the wrong choice, that some underground waste will result and he thereby become subjected to such severe penalties, under a statute which affords no guide for the operator under such circumstances. However, except in one particular hereinafter mentioned, the validity of the act as a penal statute is not before us."

Under the rule above quoted from *Small v. American Sugar Refining Company,* the same principles which induced the court to hold the statute void for uncertainty in its penal provisions should have induced it to also declare it void in its civil aspects, for the same principles apply to both. To the same effect, see

Cline v. Frink Dairy Co., 274 U. S. 445;

Hewitt v. Board of Medical Examiners, 148 Cal. 590;

Standard Chemical etc. Corp. v. Waugh, 231 N. Y. 51, 131 N. E. 566.

Having in mind the last statement of the Supreme Court of California as to the numerous viewpoints to be used in determining what constitutes "unreasonable waste of natural gas," quoted at page 71 and analyzed at pages 78-82 of our former brief, the reason for holding the California statute void for uncertainty and lack of a sufficiently definite standard or measure of conduct is much stronger than the Oklahoma case where at least some attempt is made to define the term "waste," but which, nevertheless, was held void for uncertainty. The California statute nowhere purports to vest any administrative officer, much less a court, with power to prescribe rules and regulations providing details as to what shall constitute waste, or for regulating the mode of the enforcement of the statute. If it had, it would not have aided the statute, for where the legislature itself does not prescribe a sufficient rule or standard of conduct, the power given to administrative officers to make rules and regulations cannot be used to supply the deficiency. (*In re Peppers*, 189 Cal. 682.) The power given to administrative officers to make rules and regulations is limited to the filling in of details of administration under a definite standard or guide which must be prescribed by the legislature. The standard cannot be supplied by either the executive or judicial branch of the state government.

Since all of the arguments advanced by the state courts and by counsel for appellees are fully answered by the argument, references to the record and citations of authority contained in our former brief (pages 61-107), it is respectfully submitted that the state statute is void upon its face under the due process clause of the Fourteenth Amendment.

POINT H.

The "Prima Facie Evidence" Clause of the Statute Violates the "Due Process" Clause of the Fourteenth Amendment.

The argument and citation of the previous decisions of the court set forth at pages 107-112 of "Appellants' Brief in Opposition to Motion to Dismiss or Affirm" sufficiently cover this point, reference to which is hereby made.

POINT I.

The Statute Involved, as Applied to Appellants, Unconstitutionally Impairs Appellants' Lease Contracts.

We have nothing to add to the discussion and citation on this point in our former brief (pages 112-114).

POINT J.

The Statute Involved, as Applied to Appellants, Denies to Appellants the Equal Protection of the Laws.

In addition to the argument and references to the record and the previous decisions of this court cited in our former brief on this point (pages 114-121), see:

Connolly v. Union Sewer Pipe Co., 184 U. S. 540;

Smith v. Cahoon (decided May 25, 1931), 283 U. S. ....., 75 L. Ed. 812,

and cases therein cited.

On the point that the statute unconstitutionally gives a majority in voting power of the operators power to control the nature and extent of the use to which other operators in the district may make of their property, see

Eubank v. Richmond, 226 U. S. 137;

Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 121-122.

POINT K.

If Appeal Was Improvidently Sought and Allowed, Then Certiorari Should Be Granted Upon the Papers Whereon the Appeal Was Allowed.

In the interest of brevity, we refer to what has already been said on this point in our former brief (pages 121-122).

Conclusion.

For the reasons set forth in "Appellants' Brief in Opposition to Motion to Dismiss or Affirm," supplemented by what we have added in this brief, appellants respectfully submit that the state statute of California is not only void upon its face, because repugnant to the due process clause of the Fourteenth Amendment, in the various particulars set forth, but also because the operation and effect of the state statute as applied to appellants is such that it violates the due process, equal protection and contract, clauses of the federal constitution. The judgment of the state court should therefore be reversed.

Respectfully submitted,

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